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No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Kansas

REPLY BRIEF OF PETITIONER

BERNARD NASH
JAMES VANR. SPRINGER
LAURA B. FEIGIN
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

CARLA J. STOVALL
Attorney General of
Kansas
Counsel of Record
301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(913) 296-2215

STEPHEN R. MCALLISTER
Special Assistant Attorney
General
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

Attorneys for Petitioner

October 9, 1996

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OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THE CONSTITUTION PERMITS THE STATES TO LEGISLATE REASONABLE CRITERIA FOR CIVIL COMMITMENT OF PERSONS WITH MENTAL DISORDERS, WITHOUT LIMITATION TO ANY CLINICAL DEFINITION OF "MENTAL ILLNESS."

The parties' briefs demonstrate a sharp difference of opinion as to how this Court should approach the resolution of the fundamental substantive due process questions raised in this case. The State's primary argument is that decisions regarding the mental conditions sufficient to justify involuntary civil commitment should largely be left – as they historically have been – in the hands of the state legislatures, with limited but meaningful federal judicial oversight to ensure that the choices the States make are reasonable. This approach is consistent with the numerous decisions of this Court cited in the State's opening brief, *see* Brief of Petitioner (No. 95-1649) at 20-33, including cases that recognize historical deference to the States in such matters, *id.* at 20-30, and cases that urge deference in light of the uncertain state of medical knowledge in matters involving the diagnosis and treatment of mental conditions. *Id.* at 29.

Hendricks offers a very different view, arguing that because his liberty is affected by the choices the State has made, the Kansas Sexually Violent Predator Act ("the Act") must be subjected to the most rigorous judicial scrutiny. *See* Brief for Respondent (No. 95-1649) at 12-15. He further contends, with the support of *amici* such as the American Psychiatric Association ("APA"), that the Constitution prohibits the States from involuntarily committing for care and treatment any person who is not

"mentally ill" in some narrow clinical sense of that term. Hendricks does not, however, specify how that proposed term of art is to be defined, except to suggest – as did the Kansas Supreme Court, Pet. App. 17a, 19a – that it is limited to whatever conditions would have permitted involuntary commitment under Kansas' traditional civil commitment statute, Kan. Stat. Ann. § 59-2901 *et seq.* *See* Brief for Respondent (No. 95-1649) at 19-21. Hendricks does not explain why the definition the Kansas Legislature previously drafted in that statute should constitutionally trump the additional definition the Kansas Legislature provided in the present Sexually Violent Predator Act.

Several *amici* proffer various thoughts on the subject, the common thread of which is that the only constitutionally sufficient "mental illness" is that which one or another group of clinicians deems sufficiently debilitating.[1] Their suggestions, taken together with Hendricks'

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[1] The APA brief suggests that the essential test of "mental illness" is whether the person to be committed "lack[s] rational capacity to make his own treatment decisions" or whether commitment would be otherwise "in the individual's interest," arguing that "confinement based on 'mental illness' must rest on the State's *parens patriae* power to override the individual's autonomy to act for his own good." Brief for the American Psychiatric Association at 21. Elsewhere, the APA suggests there must be an "impairment of cognitive abilities" sufficient to support an insanity defense to a criminal charge. *Id.* at 26-27. Apparently society's interest in protecting potential victims likely to be harmed as the result of a predator's mental condition has no substantial weight in the APA's opinion. The Brief of the American Civil Liberties Union *et al.* recognizes (at 16) that "this Court has not rushed to define with specificity the precise contours of [the "mental illness"] due process limitation" and agrees (at 17) that "[t]he definition of mental illness is a legal question, not purely a medical one," but goes on (at 17) to posit a core requirement "that the individual involved suffers from a significant impairment in his or her ability to reason." The Brief for the National Mental Health Association offers (at 7) the *ipse dixit* that "[t]he term 'mental illness' is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges. . . . " The brief of the Washington State Psychiatric Association contends (at 5, 7) that "a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life."

failure to propose any rational criteria, serve only to confirm what the State's opening brief shows: that the purportedly magical term "mental illness" has no single accepted meaning either in medicine or in constitutional jurisprudence. *See* Brief of Petitioner (No. 95-1649) at 39-42; *see also* briefs of *amici curiae* Menninger Foundation *et al.* (at 22-25) and States of Washington *et al.* (at 8-16). Surely neither Hendricks nor his *amici* are contending that the mere presence or absence of the phrase "mental illness" in the Act has any constitutional significance. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) ("A fertile source of perversion in constitutional theory is the tyranny of labels.").[2] Thus, they offer no rational alternative

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[2] Like the similar argument in his opening brief in No. 95-9075, Hendricks' argument that this Court is bound by the Kansas Supreme Court's conclusion that the Act does not require "mental illness" (Brief for Respondent at 20-21) is unfounded. That conclusion was merely an element of the Kansas Supreme Court's interpretation of what it perceived to be a federal substantive due process requirement imposed by *Foucha v. Louisiana*, 504 U.S. 71 (1992). The Kansas Supreme Court was not interpreting the scope of the Kansas Act as a

to a standard of review that accords respect to the States' legislative judgments regarding appropriate substantive criteria. Indeed, that standard of review already has been established by this Court's decisions allowing the States reasonable discretion in this difficult area.

A. This Court's Precedents Properly Allow The States Reasonable Discretion To Utilize Involuntary Civil Commitment As A Means Of Dealing With Sex Offenders Who Suffer From Identifiable Mental Conditions.

As clearly demonstrated in the State's opening brief, this Court's precedents repeatedly have taken a deferential approach to evaluating the constitutionality of substantive standards for involuntary civil commitment. *See* Brief of Petitioner (No. 95-1649) at 20-33. For example, in *Jackson v. Indiana*, 406 U.S. 715 (1972), which Hendricks barely addresses, *see* Brief for Respondent (No. 95-1649) at 14 n. 10, this Court recognized that "States have traditionally exercised broad power to commit persons found to be mentally ill." 406 U.S. at 736. The Court held in that case that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Clearly, the most logical reading of *Jackson* is that the

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matter of Kansas law, and therefore its conclusion deserves no deference in this Court's determination whether the clear provisions of that Act are valid under the United States Constitution. *See* Brief of Cross-Respondent (No. 95-9075) at 21-22.

Court adopted a deferential level of review in this context.[3]

More recently, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court rejected a substantive due process challenge to the federal government's continued detention of deportable juvenile aliens in custodial institutions rather than releasing them to the custody of responsible adults. In rejecting the challenge, the Court declared that "where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution." *Id.* at 303. Rather, the Court concluded that the decision to detain such persons in custodial institutions "is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child.' " *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).[4]

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[3] In arguing that there is no basis for anxiety over a conclusion that heightened scrutiny applies to the substance of state civil commitment systems, *see* Brief for Respondent at 15 n. 12, Hendricks ignores that this Court always has accorded considerable deference to the States' choices regarding the substance of their criminal laws, an analogy that has obvious force in this context. *See, e.g., Montana v. Egelhoff*, 116 S. Ct. 2013, 2024 (1996) ("States enjoy wide latitude in defining the elements of criminal offenses. . . . ") (Ginsburg, J., concurring).

[4] Later in the opinion, the Court specifically observed that "the regulation [at issue] involves no deprivation of a 'fundamental' right. . . . " 507 U.S. at 311. The State recognizes that two Justices expressed the opinion in *Flores* that the "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." *Id.* at 316 (O'Connor, J., concurring, joined by Souter, J.). Even those Justices, however, did not contend that strict scrutiny would apply in such a case; instead they declared that the State must

Certainly, it is not true that the Court has uniformly subjected *every* restriction on individual liberty interests to the most exacting scrutiny.[5]

B. The Commitment Criteria The Kansas Sexually Violent Predator Act Specifies Are Clinically Meaningful And Can Readily Be Applied By Mental Health Professionals.

The *amicus* briefs filed in this case demonstrate significant differences of opinion among medical experts as to the existence of diagnosable proclivities to sexual violence and the susceptibility of such conditions to treatment. To be sure, the Brief for the APA opines (at 18-19) that psychiatrists cannot reliably predict the future dangerousness of sex predators and (at 28-30) that there is insufficient evidence that the mental conditions making

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have "a 'sufficiently compelling' governmental interest to justify such action." *Id.*

[5] Hendricks asserts that the State is arguing for the minimal scrutiny of cases such as *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). *See* Brief for Respondent at 13, 16. To the contrary, the State has carefully articulated the standard as one of "reasonableness," a concept that may differ from rational basis review by providing the Court with more authority to evaluate the nature of and actual basis for particular legislative judgments in cases involving important liberty interests. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 392 (5th ed. 1995); *see also id.* at 384 (noting the uncertainty regarding the Court's level of review generally in substantive due process cases). In any event, Hendricks certainly is correct that the State has taken the position that the level of review is less than strict scrutiny, although the Act also passes constitutional muster under that more exacting standard.

future predation likely can be treated successfully. Here, as in previous cases, however, the views of that organization are not conclusive in light of the sharply conflicting views of other professionals, as reflected in the briefs of other *amici*. *Cf. Barefoot v. Estelle*, 463 U.S. 880, 899 (1983) (declining to be guided by APA brief's assertion that dangerousness was not reliably predictable, noting that "[t]he *amicus* does not suggest that there are not other views held by members of the Association or of the profession generally," and declaring that the Court was not "convinced . . . the view of the APA should be converted into a constitutional rule"); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981) (same).[6]

The *amicus* Menninger Foundation – a nationally recognized private psychiatric institution – observes that many psychiatrists believe that the future dangerousness of those suffering from some mental conditions can be adequately ascertained, *see* Brief of the Menninger Foundation *et al.* at 16-18, and that there are medically recognized treatments for sex offenders such as Hendricks. *Id.* at 26-29. Similarly, the *amicus* brief filed by the Association for the Treatment of Sexual Abusers – an international organization composed of mental health professionals each of whom has engaged in at least 2000 hours of evaluating and treating sex offenders – explains (1) that mental health professionals can understand, apply and give meaning to legal concepts such as "mental

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[6] Much of the APA's brief is devoted to recasting legal arguments that it made – but this Court correctly rejected – in *Allen v. Illinois*, 478 U.S. 364 (1986).

abnormality" and "mental illness," *see* Brief of the Association for the Treatment of Sexual Abusers at 3-9, (2) that the definition of "mental abnormality" in the Kansas Act is consistent with professional diagnostic processes, *id.* at 10-11, and (3) that sex offenders can be treated, *id.* at 11-12.

This Court previously has rejected the argument that "power to legislate in this area depends on the research conducted by the psychiatric community. . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983); *cf.* Henry Weihofen, *The Definition of Mental Illness*, 21 Ohio St. L.J. 1, 12 (1960) ("where the legal rule concerns mentally disordered persons, any answer should accord with current psychiatric knowledge. . . . But the ultimate decision is not merely a psychiatric one. It is a major policy decision."). Surely, given the medical and scientific authorities offered in support of the Kansas Act in this case, the substance of the Kansas Act embodies a "reasonable legislative judgment" regarding the mental conditions sufficient to require the involuntary care and treatment of some who present a continuing danger to the community.

There is a constitutional tradition of permitting the States considerable discretion in creating and implementing the substance of involuntary civil commitment systems. This Court has expressly recognized that tradition, declaring that "[t]he States have traditionally exercised broad power to commit persons found to be mentally ill," and accepting the fact that "[t]he substantive limitations

on the exercise of this power and the procedures for invoking it vary drastically among the States." *Jackson v. Indiana*, 406 U.S. 715, 736-37 (1972). The correctness of that observation is further detailed and supported by the sources cited in the Brief of Cross-Respondent (No. 95-9075) at 17-18. *See also* Brief of the Menninger Foundation *et al.* at 5-14 (reviewing historical evidence of the bases for civil commitment). It is Hendricks, not the State of Kansas, who is inviting this Court to break new constitutional ground and in so doing usher in an era of intrusive federal judicial review of mental health matters for which the States traditionally have been responsible.

It is important to note – as Hendricks and his *amici* do not – that the framework in which the "mental illness" issue arises in this case is quite different in kind from that discussed in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The discussion of "mental illness" there arose in the context of an acquittal by reason of insanity on charges of burglary and unlawful use of a firearm. Moreover, the "dangerousness" issue related to predicting whether Foucha might in the future commit crimes of *any* nature. *See* 504 U.S. at 75, 82. The commission of burglary and firearms offenses is not generally viewed as necessarily reflecting the presence of any mental disturbance. Indeed, individuals who commit such crimes commonly are sane in both clinical and ordinary usage and do so for entirely rational reasons. In contrast, a legislature reasonably can view sexual predation – such as Hendricks' decades of preying upon children of varying ages and either gender – as potentially reflecting a disturbed mental condition which, if it persists, is likely to lead to irrational and irresistible urges to harm additional victims in the same manner.

Moreover, there is nothing "circular" about examining past conduct as part of a professional determination whether such a mental condition is present. *See* Brief of the Association for the Treatment of Sexual Abusers at 10-11. In short, statutes such as the Kansas Act deal with mental health issues that are unique to this particularly sensitive and difficult area of human behavior, and the States' approaches to those issues should not be constrained by mechanical extrapolation of language and analysis used in the very different context that *Foucha* presented.[7]

II. HENDRICKS' REPEATED COMPLAINTS ABOUT HIS CARE AND TREATMENT PROGRAM ARE IRRELEVANT TO THE ISSUES BEFORE THIS COURT.

As in his opening brief in No. 95-9075, Hendricks persists in arguing that the Act is unconstitutional – apparently on its face – because the State allegedly has not implemented a treatment program to his satisfaction. *See* Brief for Respondent (No. 95-1649) at 5-7. The problems with this argument are manifest.

First, as explained fully in the State's opening and responsive briefs, the Act specifically requires the provision of care and treatment. The appropriate way to challenge the implementation of the Act in this respect is to

[7] As noted in the Brief of Petitioner (No. 95-1649) at 35, this Court had no occasion to define the term "mental illness" in *Foucha* because Louisiana conceded the absence of any continuing mental illness.

litigate the adequacy of the treatment program in a separate proceeding. This Court has made clear that questions of implementation generally provide no basis for invalidating a statute on its face. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301 (1993). Second, Hendricks twice has raised this very argument before Kansas trial courts, twice had the opportunity to present evidence and argument regarding the treatment program, and twice had his claims expressly and specifically rejected by the trial courts. *See* Brief of Cross-Respondent (No. 95-9075) at 23-28; *see also* Brief of Petitioner (No. 95-1649) at 42-44. Third, this Court has "avoided ruling on whether involuntarily committed persons have a constitutionally protected right to minimally adequate rehabilitative treatment." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 522-23 (5th ed. 1995) (footnote omitted). Thus, this Court has never decided whether Hendricks even has the constitutional right to treatment which he apparently now claims. And certainly Hendricks did not seek review of this issue in his conditional cross-petition, nor is it fairly encompassed by any of the issues the parties have raised.

* * *

The essence of the arguments of Hendricks and his *amici* is that the States' only constitutional option is to sentence repeat sex offenders to life imprisonment without parole. Even the option of forgoing criminal punishment altogether in favor of involuntary civil commitment for long-term care and treatment, as under the Illinois statute at issue in *Allen v. Illinois*, would not be available. That is because, in the view of Hendricks and some of his *amici*, virtually no sex offenders suffer from the kind of

"mental illness" that they contend is a constitutional prerequisite to *any* civil commitment. Never do Hendricks and his *amici* address, however, why life imprisonment without parole would be in the best interest of repeat sex offenders who suffer from significant abnormal mental conditions. Surely, in the circumstances presented here, it is both reasonable and humane for the State to choose an option less harsh than life imprisonment without parole.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth more fully in the Petitioner State of Kansas' opening brief in No. 95-1649 and its responsive brief in No. 95-9075, the State respectfully requests that this Court hold that the Kansas Sexually Violent Predator Act is constitutional.

Respectfully submitted,

BERNARD NASH
JAMES VANR. SPRINGER
LAURA B. FEIGIN
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

CARLA J. STOVALL
Attorney General of Kansas
Counsel of Record
301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(913) 296-2215

STEPHEN R. MCALLISTER
Special Assistant Attorney
General
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

Attorneys for Petitioner

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